

H841func

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 JENNIFER FUNG-SCHWARTZ, MD,

4 Plaintiff,

5 v.

17 Civ. 233 (VSB)

6 CERNER CORPORATION, CERNER
7 HEALTHCARE SOLUTIONS, INC.,

8 Defendants.

Conference

9 New York, N.Y.
10 August 4, 2017
11 11:06 a.m.

12 Before:

13 HON. VERNON S. BRODERICK,

14 District Judge

15 APPEARANCES

16 ELIZABETH SHIELDKRET, ESQ.
17 Attorney for Plaintiff

18 SHOOK, HARDY & BACON LLP
19 Attorneys for Defendants
20 BY: PATRICK N. FANNING, ESQ.

H841func

(Case called)

THE COURT: Okay. Would the parties please identify themselves for the record.

MS. SHIELDKRET: Elizabeth Shieldkret for plaintiff Dr. Jennifer Fung-Schwartz, and with me at counsel table is Dr. Fung-Schwartz.

THE COURT: Okay. All right. Good morning.

And for the defendants.

MR. FANNING: Good morning, your Honor. Pat Fanning on behalf of the defendants.

THE COURT: Okay. Good morning.

All right. Let me review for the parties the documents I have in connection with today's conference. I have an October 19, 2016 email from Ms. Shieldkret writing to a possible stipulation in 16 CV 8019; Mr. Fanning's June 29th letter of this year regarding defendant's motion to dismiss; I have Ms. Shieldkret's July 6 response letter; and I have the parties' briefing with regard to the temporary restraining order and PI, which are Docket 23 through 35. Are there any other materials I should have in connection with today's conference? Oh, and I guess there is a -- I don't know if I have it in front of me, but there was another complaint that was filed. I'm not sure if I have it here now.

But is there anything else I should have?
Ms. Shieldkret?

H841func

1 MS. SHIELDKRET: Your Honor, there is a June 22, 2017
2 letter from me to the Court, and I just want to check the --

3 THE COURT: I'm sorry. That's a June 22nd?

4 MS. SHIELDKRET: 22nd. It was before we filed -- it
5 may be Docket No. 22. I'm just checking that. And that
6 relates to their motion to dismiss as well.

7 THE COURT: Okay.

8 MR. FANNING: Your Honor, the amended complaint would
9 be relevant to the June 29th letter, if you have it with you.

10 THE COURT: Okay. We'll get started. I'm without my
11 deputy clerk so we don't have access to the printer here, but
12 I'll have one of my staff print out those documents and bring
13 them up to me, but I think we should get started.

14 MS. SHIELDKRET: Your Honor, I brought copies of the
15 June 22nd letter and I found that.

16 THE COURT: Okay. All right.

17 MS. SHIELDKRET: If I may hand them up?

18 THE COURT: Yes.

19 MS. SHIELDKRET: I've got two copies for you and one
20 for my opposing counsel.

21 THE COURT: Okay. All right.

22 MR. FANNING: Thank you.

23 THE COURT: So let me ask, with regard to the case
24 that was more recently filed, why was that case filed? It
25 seems like the claims appear to be essentially, other than I

H841func

1 guess the class claims, essentially identical to the first
2 complaint, which is a 16 CV 8019. I guess the second case is
3 17 CV 233. So why was the second case filed?

4 MS. SHIELDKRET: Yes, your Honor. So I wrote the
5 Court a letter on January 11, 2017, in the 8019 case to advise
6 the Court we hadn't served a complaint. We wanted a little bit
7 of time to figure out what the technical situation was and what
8 we really needed and -- but we at that time were actually
9 having an outage with the service and so we felt it was prudent
10 to keep a case active so that all of that would be resolved.
11 And I wrote a letter to the Court telling them we had refiled
12 just out of an abundance of caution to not have a gap in the
13 case and that we would, you know, continue to file in whichever
14 case the Court thought was appropriate. But in the meantime,
15 we had an active case with the same complaint, and soon after
16 that, the second outage issue was resolved. But we did file
17 the second complaint, so it was really just to make sure that
18 the case wasn't dismissed for lack of service.

19 THE COURT: Okay. All right. So I didn't quite
20 understand that it was a -- in other words, the first complaint
21 was never served. And I had mistakenly assumed that it had
22 been. But, okay. So in essence it was to preserve -- okay.
23 All right. I understand.

24 So let me ask the defense: With regard to the first
25 complaint, I take it your client hadn't been served, is that --

H841func

1 MR. FANNING: That's correct, your Honor. You may
2 recall that the first complaint was filed and counsel for the
3 plaintiff had sent it to Cerner and then advised Cerner that
4 she wanted a TRO about a discontinuation in certain services.

5 THE COURT: Yes.

6 MR. FANNING: And so we had a phone call with the
7 Court, and at that point we resolved whatever issue existed.

8 THE COURT: Yes.

9 MR. FANNING: I thought it went away. I think we
10 fully expected to get served with a complaint but never got
11 served.

12 THE COURT: Okay.

13 MR. FANNING: And then the issue that was referenced
14 in January was a third-party application interruption, not
15 something where Cerner had advised to disconnect or do anything
16 with the solution. So that issue was quickly rectified, but
17 then that second complaint was filed for some reason rather
18 than simply seeking more time to serve. I know the rules have
19 changed, but you could still do that.

20 THE COURT: Yes. Okay. So we need to I guess deal
21 with which complaint is going to be the operative complaint.
22 So I take it the second complaint, am I correct there are some
23 class claims in there? In other words, there's a reference to
24 a class of patients, basically. But there is no class
25 representative, I take it, in the second complaint.

H841func

1 MS. SHIELDKRET: Correct, your Honor. So in the
2 second case, we subsequently filed an amended complaint, and
3 what that has is Dr. Fung-Schwartz as the sort of
4 representative because of the special doctor/patient
5 relationship, that there's sort of two categories of claims,
6 where we believe she can also step into the footing of the
7 patient. One is because of reimbursements which get signed
8 over to her for the medical care, and the other is for the
9 privacy issues about the medical records and the interruption
10 in service.

11 THE COURT: Okay. Well, I mean, just in thinking
12 about it, I think while there may be some similar type of
13 issues that relate to patient and the doctor, but there are
14 also I think significant things that are different that come to
15 mind. So for example, the fact is that -- and I'm not sure
16 concerning the ownership of the files, you know, who has more
17 of a claim, in other words, the patient, who can go see another
18 physician and ask for their records to be transferred, or the
19 physician.

20 So secondly, there is an issue that the patients
21 aren't involved in this sort of -- and I know there may be a
22 disagreement on how to characterize it -- payment disputes.
23 And so with regard to the doctor's ability to be a
24 representative of them, I think that in terms of a class
25 action, it doesn't seem to me that she would be a class

H841func

1 representative in that regard.

2 MS. SHIELDKRET: Your Honor, I want to make sure that
3 you understand, there are two different payment kind of
4 disputes here. The one that we filed a preliminary injunction
5 about is for the health records, and that's a dispute between
6 Dr. Fung-Schwartz and Cerner. What's implicated there is the
7 patients' access rights and privacy rights, which are the same
8 rights that Dr. Fung-Schwartz has to the records. There's a
9 separate part of the case which is not part of this motion,
10 which has to do with Cerner provided another service, which is
11 really the thing that there was a dispute about. They were
12 sending bills to patients. Patients had assigned things, for
13 example, like their Medicare payments to Dr. Fung-Schwartz.
14 Cerner was not billing Medicare properly so those claims were
15 getting rejected, and then they were telling the patients, you
16 owe the money. She doesn't want to go and collect that money
17 from the patients. The patients have already assigned their
18 right to the money to her. And that's why, rather than make us
19 go through an extra step of having to have the patients go back
20 to Cerner and say, you're the one that messed up my Medicare
21 claim, she already has that assignment from the patients and
22 she should be able to say, I deserve this money and I would
23 have gotten it from Medicare but for your processing the claim
24 improperly.

25 THE COURT: But isn't that a different claim than --

H841func

1 in other words, if there is an assignment, is the assignment
2 indicated in the amended complaint?

3 MS. SHIELDKRET: Yes.

4 THE COURT: Because it's different than, I think, a
5 class action. And was the assignment attached to the amended
6 complaint?

7 MS. SHIELDKRET: I don't believe it was attached to
8 the amended complaint. It was described in the amended
9 complaint. And right, and so it's not a class action. It's
10 basically a third-party representative saying, we have the same
11 insurance. We're aligned. And that is something that courts
12 have recognized doctors can do.

13 THE COURT: But it's not necessary -- well, I'm not
14 sure, because I haven't seen the assignment, but as I
15 understand it, it would be, you know, the patients who had this
16 right, they have transferred that right to the doctor through
17 the assignment. And again, I don't know what, because in part
18 the devil is in the details here as to what the assignment
19 actually says and what the doctor has received and what the
20 patient has retained or given up. You know, if it's merely
21 signing over a right to payment, I guess I don't know. But I
22 guess in terms of what complaint should be the operative
23 complaint, since the first complaint was not served and the
24 second complaint was, it seems to me that, well, I think the
25 second complaint should be the operative complaint that we

H841func

1 operate off of, but let me hear from the defense with regard to
2 that. Because I know there was a motion to dismiss that had
3 been filed with regard to the first complaint. Am I correct?

4 MR. FANNING: Your Honor, this is where it gets
5 confusing. The first complaint filed in the 2016 lawsuit was
6 identical to the five-count second complaint filed in the 2017
7 lawsuit. We moved to dismiss the identical complaint, so the
8 2017 lawsuit, five-count complaint. In response, we were met
9 with an 18-count amended complaint in the second lawsuit that
10 added patients. And I don't mean to be difficult here, but
11 there is a conversion claim, which I think is the basis for
12 this preliminary injunction motion. Count One of the second
13 amended complaint brings the conversion claim, from what I can
14 tell, on behalf of the patients, so it's not subject to a
15 contractual assignment. It is a suggestion that the patients
16 are in here in court pursuing a conversion claim and they're
17 using the doctor to do it. That's part of the challenge with
18 the second amended complaint, as well as the motion that we're
19 talking about.

20 THE COURT: Okay. All right. Well, let me ask this,
21 Ms. Shieldkret. Is that an accurate description of the
22 conversion claim?

23 MS. SHIELDKRET: Yes, your Honor.

24 THE COURT: Okay. And what is the actual nature of
25 the conversion? And have there been complaints by the patients

H841func

1 about this?

2 MS. SHIELDKRET: No, your Honor. It's when they
3 turned off the system and she couldn't get access to medical
4 records at all that compromised not just Dr. Fung-Schwartz's
5 rights but the patients' rights as well, and because their
6 rights are intertwined, they have a right to access and she has
7 to keep the files, the medical records available for them, we
8 believe that she can stand in for the patients and bring the
9 claim on both parts, because there are patients' rights here
10 that are implicated, whether that's completely turning off the
11 system or even the dispute we have now about what's going to
12 happen with the system.

13 THE COURT: Although as I understand it, there was a
14 break in service that occurred in 2016, there was another
15 shorter break in service that I understand, Mr. Fanning, was
16 not related, was some other technical issue that was fairly
17 quickly resolved. So in terms of where things stand, and there
18 have been no patient complaints, there is no assertion that the
19 patients requested some record that, in other words, they were
20 going to another physician, they were unable to get those
21 records. So the issue with regard to a TRO, it seems to me the
22 conduct or the issue would be stale here.

23 In addition, I don't see, as I understand it, where
24 the irreparable harm is, in other words, you know, going
25 forward.

H841func

1 So with regard to the pending TRO and the application,
2 because the activities at issue were from 2015 and because I
3 know there was a refiling of the TRO and because I don't see
4 that there's irreparable harm here, in other words, harm that
5 couldn't be taken care of through damages, I'm going to deny
6 the TRO at this stage.

7 So I guess the question I have is: There is, as I
8 understand it, a motion to dismiss the most recent complaint?
9 Am I correct, Mr. Fanning?

10 MR. FANNING: There is a premotion letter that we
11 submitted to the Court with respect to the most recent
12 complaint.

13 THE COURT: Okay.

14 MS. SHIELDKRET: Your Honor, if I may.

15 THE COURT: Yes.

16 MS. SHIELDKRET: The issue with the preliminary
17 injunction, it relates to them bringing this motion to dismiss.
18 What they're trying to do is to get the equitable relief
19 removed from the case, and what that does is it says -- now we
20 have a status quo where she has access to the records. They're
21 trying to change the status quo so they can deny her access to
22 the records. And the same thing with getting Cerner Corp. out,
23 which is part of their motion. That's what's changed. That's
24 what's changed since May, when they started doing this, and
25 we're concerned now, when she goes back to the office now, is

H841func

1 the service going to be on? Because if we leave here without
2 some sort of resolution about what rights she has to records,
3 then I believe they're going to take that as they can turn it
4 off. That's what they want to do, and they confirmed that in
5 their opposition to the preliminary injunction motion. So the
6 question is, you know, what are they willing to do before the
7 resolution of this action? Because when they turn the records
8 off, that's it. I mean, there is irreparable harm because it's
9 going to deny medical care to patients.

10 THE COURT: But am I correct, Mr. Fanning, that your
11 client is willing to transfer these records to another server?

12 MR. FANNING: Absolutely, and always has been, your
13 Honor. That's never been an issue.

14 THE COURT: So why isn't that a solution? In other
15 words, why can't these records be transferred to another
16 provider?

17 MS. SHIELDKRET: So there are a couple reasons, and
18 she has tried. She's gone to other medical offices and looked
19 at different systems and she's also started using a different
20 provider. There are, in addition to training and user issues,
21 it's not a one-to-one correspondence of where records will go,
22 and so it's not an easy process.

23 Also, because she started using electronic medical
24 records before it was really mandated, she's got a lot more
25 records in the system than, you know, people who had started

H841func

1 using it more recently. To do a transfer, she's got a complex
2 transfer to do. And she's an individual practitioner, so she's
3 got fewer resources. She doesn't have an IT person. So when
4 they say they're willing to do the transfer, they're willing to
5 release the records, but that doesn't mean it's going to safely
6 get into a new system. And that's what our issue is for the
7 patients going forward.

8 But even if that were not a technical challenge, which
9 is the problem that she has, she wants to be able to continue
10 to use the system right now because she doesn't have a clear
11 path that everything will get from System 1 to System 2. It's
12 not a situation -- I mean, there's a dispute about this
13 contract. She had a contract for the services to 2019. So if
14 she prevails at the end, you're placing all the burden on her
15 to make a switch to a new system when she may prevail at the
16 end on the contract and had the right all along to do this
17 through 2019, and that just seems like, on the balance of the
18 hardships, why can't we just stay with the status quo, have her
19 use the system. All they're saying is they want money for it,
20 and that can be satisfied either with security now or with
21 payment at the end of the lawsuit.

22 THE COURT: Well, I guess, I mean, I still don't see
23 where the TRO comes in. And we had talked about a stipulation
24 to maintain the status quo. And as I understand it, the system
25 really hasn't been turned off, so to speak. So, I mean, the

H841func

1 issue may be, Ms. Shieldkret, that, you know, if the motion to
2 dismiss is granted, you know, then there's no case. In other
3 words, I don't know, and I'm not prejudging anything, but as I
4 understand it, am I correct that there are fees that are owed
5 to the defendants?

6 MS. SHIELDKRET: No. That's the dispute. She paid
7 them for services she didn't receive, and so she's overpaid,
8 and that's what the issue is.

9 THE COURT: All right.

10 MS. SHIELDKRET: They say she owes them money, and we
11 say no, they actually need to reimburse her.

12 THE COURT: All right. But at core, isn't this just a
13 breach of contract case?

14 MS. SHIELDKRET: No, your Honor, because they owed
15 other duties outside of the contract, and that's what those
16 HIPAA regulations are all about. No matter what they did, what
17 the contract says, turning off the service was a violation --

18 THE COURT: But, again, that was a one-time issue.
19 That was resolved. There may be some damages that are
20 associated with that. I don't know. And the services haven't
21 been turned off again. So the issue becomes, this case I think
22 needs to get resolved, and I'm trying to get it there. What's
23 the end game here? I mean, because in the end -- and I haven't
24 looked at the contract, but I would imagine it has an out for
25 both parties in some way. Whether that's a transition to a new

H841func

1 provider or whether there is a notification period that the
2 doctor could serve if she was going to terminate their services
3 in advance of the 2019 end date, I don't know. But, you know,
4 in response to my question, what I heard you to be saying is
5 that it would be difficult to transition to another system. So
6 if what you're saying is that the doctor wants to remain with
7 this service and the issue is about things that she paid for
8 that she didn't receive -- and I'm not sure what that is. Is
9 that in the nature of the time that the system was shut off or
10 was that additional things that she wasn't able to receive
11 during the pendency of the contract so far?

12 MS. SHIELDKRET: So the real dispute here, other than
13 turning off the medical records system that day, she was happy
14 using the medical records system, but the real dispute here is
15 about the billing system, and what happened was, they failed to
16 collect over \$200,000 worth of billing for her, and that's why
17 we're saying, if she has to go back and collect that from the
18 patients, the patients then just have to go back to Cerner and
19 say: You caused this. You know what, you had a duty to comply
20 with the Medicare billing requirement and you didn't do this.
21 And so it just gets back to Cerner, which is why we're saying,
22 you know, this money is owed to her and, you know, under the
23 contract, they didn't perform the services. But beyond that,
24 they didn't do the thing that they owed everybody in this case,
25 which was to properly process these claims.

H841func

1 THE COURT: Okay. But again, that's a breach of
2 contract. That's still a breach of contract claim. So I guess
3 what I'm saying is, I still don't see the issue for a TRO, so
4 I'm going to maintain my ruling with regard to that, with
5 regard to the system and keeping it on during the pendency of
6 this case, and I'll make the direction, Mr. Fanning, that your
7 client shouldn't use the kill switch, whatever that is. If
8 there is such a thing. I thought that there had been agreement
9 between the parties back some time ago about that issue and
10 that there was going to be some form of stipulation. And we
11 can proceed with the current complaint.

12 Mr. Fanning, we can talk about the motion to dismiss
13 and scheduling that and proceed from there. Does that make
14 sense, Mr. Fanning?

15 MR. FANNING: Your Honor, that would be fine. The
16 real challenge -- nobody's taken away anything, but we're not
17 getting paid. And keep in mind, there are two -- we keep
18 talking about the property interest in being able to read
19 medical records, which is what the current verbiage is for
20 medical records was never taken away. The other property
21 interest that's out there is our license that she refuses to
22 pay for, and the dispute that she has with regard to billing
23 services is completely separate and apart from her continued
24 use over the last at least 18 months of the EMR without paying
25 for it. And so nobody's going to activate a kill switch, but

H841func

1 we just want out of this relationship, and if the parties have
2 a breach of contract that we're each going to do battle over,
3 that makes sense, I guess, if we have to do that, but we don't
4 want to continue to be entangled in this relationship for
5 however long it takes to get this case resolved, when she's not
6 paying. So we have a challenge there.

7 Now the other issue with respect to the motion to
8 dismiss, we would like to address, because there are a bunch of
9 counts in there now. One request we would make, is there any
10 way we could, at least for purposes of a motion to dismiss,
11 disregard these cases, these various counts that are brought on
12 behalf of the patients? Because there is no patient plaintiff
13 in this case right now.

14 THE COURT: And again, I think as I indicated, and it
15 may be just the way it's phrased, but there are no patients
16 here, and therefore, I'm not sure if the conversion claim is
17 brought on behalf of the patients. Why don't we do this.
18 Well, let me put it this way, Mr. Fanning. You can move to
19 dismiss whichever count you deem appropriate, and so if it's
20 not with regard to all of the counts, that's fine. Other than
21 the assignment issue, other than that, where there may be some
22 sort of a shift and the patient may have turned over their
23 right to pursue certain claims to the doctor, and that may be
24 the case, I don't know, you know, the conversion itself, to the
25 extent that it relates to medical records, it doesn't sound as

H841func

1 if any patients have either complained or been implicated here,
2 so I'm not sure that a claim on their behalf necessarily --
3 obviously, I think it has been alleged that the doctor has an
4 interest in those records. So I guess, Mr. Fanning, you can
5 move to dismiss whichever count you deem appropriate. To the
6 extent what you're saying is, you're going to move to dismiss
7 some of them, I'll hold in abeyance the necessity of answering
8 with regard to that until we can clear up exactly what remains.
9 And I guess because there is this issue, are there going to be
10 counterclaims here and/or another lawsuit with regard to the
11 monies that your client claimed that they're owed?

12 MR. FANNING: Yes, your Honor. There will be a breach
13 of contract on the claim, very straightforward. It's just the
14 amount she hasn't paid for the contract that she's involved
15 with.

16 THE COURT: Okay. All right.

17 Yes, Ms. Shieldkret.

18 MS. SHIELDKRET: Your Honor, there are two things I'd
19 like to address. The first is, we're not averse to paying
20 during the pendency of the action to keep the service active,
21 but counsel has not been able to reach an agreement on that
22 because defense had a bunch of conditions that we just couldn't
23 agree to. And they haven't been sending her bills. So the
24 amount that we've been getting, you know, the amount they put
25 in the papers this time was different from what we thought it

H841func

1 was. But there's some number. If none of them are
2 unreasonable, we're willing to pay them during the pendency of
3 the suit to keep the service available.

4 But the second thing -- and they keep doing this, and
5 it's upsetting to my client -- is, they keep saying she had
6 read only access when they hit the kill switch, and that's just
7 not true. You've got two declarations from the doctor and from
8 her assistant that said she had no access at all. They had
9 nothing. And in response to our papers, they didn't put in
10 anything that said they did have access. So I just don't want
11 to continue this fiction that they keep saying they had read
12 only access to the Court, because what they're offering now is
13 read only access when they get her off the system, and that's
14 one of the things that we're concerned about is, I'm not sure
15 that they know when they're looking at the system what she's
16 seeing in her office, but when they hit the kill switch, she
17 didn't have any access at all. She could not log in.

18 THE COURT: Okay. But as I understand it, since that
19 time she's been able to log in and get the information.

20 Look, I understand, and again, I don't recall whether
21 I've gotten an affidavit from the defendants about what sort of
22 access there was. It may be that there's representations from
23 counsel on that. But obviously that's something that counsel
24 doesn't have personal knowledge of, so it's not an issue right
25 now that's necessarily before me as a factual matter.

H841func

1 But with regard to the payment, Mr. Fanning,
2 Ms. Shieldkret mentioned there were certain conditions about
3 payment and the like. As I've indicated, the system should
4 remain on. But I guess the question is, if there is a certain
5 amount of money that your client believes that it's owed and
6 there are invoices and things like that, if there were
7 conditions that you were setting, what I think I hear
8 Ms. Shieldkret saying is that you can put that money in escrow,
9 I guess, so that your client can have some assurance that it is
10 monies that are there, and it may also deal with, at least in
11 part, in part, the counterclaim that you intend to bring, and
12 the amount of damages that might be accruing, basically,
13 because of the nonpayment. So I don't know whether that's the
14 solution that the parties can agree to, but again, I don't want
15 to get involved. I don't know what the conditions may or may
16 not have been. But in that way, at least you know the money is
17 there and can decide on what the terms of the escrow would be.
18 I would leave it to the parties to figure that out. And I
19 understand it may be that your client may be concerned that
20 accepting payment means you're acquiescing to the contract and
21 therefore are going to be, you know, needing to provide the
22 services in 2019 or something like that. So I don't know what
23 the issues are, but I think a way to deal with this or at least
24 stem the amount of damages that might be related to the
25 counterclaims which you've indicated you may file would be to

H841func

1 place the monies in escrow. So I will suggest the parties
2 discuss that as you're working through the motion to dismiss
3 papers.

4 And just to get back to the other point, so with
5 regard to what access the doctor had or didn't have, I'm not
6 making any factual findings on that. So you've preserved the
7 record in terms of that, so I think that that issue is dealt
8 with. But on the issue of the escrow account, I'll leave it to
9 the parties to talk about that and see if you can work that
10 out. Does that make sense, Ms. Shieldkret?

11 MS. SHIELDKRET: Thank you, your Honor. Yes. With
12 respect to the EMR service, not the full amount that they're
13 claiming is due, but with respect to the EMR service, we're
14 certainly willing to work it out with them.

15 THE COURT: Okay. I don't know exactly what you mean.
16 In other words, there are certain fees your client would be
17 willing to pay and put in escrow and others that you still
18 dispute.

19 MS. SHIELDKRET: Yes.

20 THE COURT: So that's fine. Look, if you can work it
21 out, I think any amount of money that's put aside I think
22 lessens the amount that might be, you know, in a counterclaim.
23 And obviously you can decide, whatever the bells and whistles
24 are, well, whatever the parties want to work out. And if it
25 doesn't work out, as I said, at least during the pendency of

H841func

1 the motion to dismiss, the system should remain on. Hopefully
2 you'll be able to resolve it either through payment without the
3 payment being any admission, and without having any effect on
4 the motion to dismiss and the desire of the defendants to
5 terminate the contract or the like.

6 So let me ask this: How much time would you like to
7 file your motion to dismiss, Mr. Fanning?

8 MR. FANNING: Your Honor, would 14 days be okay?

9 THE COURT: That's fine. So 14 days from today.

10 MR. FANNING: August 18th?

11 THE COURT: Okay. How much time for your opposition?

12 MS. SHIELDKRET: Your Honor, I'd like an extra week
13 because the Labor Day holiday falls in there.

14 THE COURT: Okay. That's fine. So three weeks from
15 the 18th?

16 MS. SHIELDKRET: Yes, your Honor.

17 THE COURT: Okay.

18 THE LAW CLERK: That's September 8th.

19 THE COURT: September 8th?

20 Mr. Fanning, a week on reply, is that --

21 MR. FANNING: Yes, your Honor.

22 THE COURT: Okay. So the 15th. All right. 15th
23 on reply.

24 All right. Once I see the papers, I'll determine
25 whether or not I think oral argument is necessary. And as I

H841func

1 mentioned, during the pendency of the motion, even if you don't
2 move against all counts, we'll hold the answer in abeyance in
3 light of the motion to dismiss.

4 Are there any other issues that I need to deal with
5 today? Ms. Shieldkret?

6 MS. SHIELDKRET: No. That's all, your Honor. Thank
7 you.

8 THE COURT: Okay. Mr. Fanning?

9 MR. FANNING: I probably need to correct one thing on
10 the record.

11 THE COURT: Oh, yes. Go ahead. Yes.

12 MR. FANNING: I mentioned that counterclaim on breach
13 of contract and then Ms. Shieldkret mentioned that
14 Dr. Fung-Schwartz has not been getting billed since I think
15 October, and that might have something to do with the
16 termination of the contract, so just for purposes of the
17 record, it's possible the counterclaim would be quantum meruit
18 if necessary on services since October of 2016, or whenever she
19 stopped getting billed. So I just want to make sure that
20 that's clear, that I'm not --

21 THE COURT: I think I understand. Basically the
22 invoicing may have stopped because your client's position is
23 that they're terminating the contract.

24 MR. FANNING: So if we're not in a contractual phase,
25 either now or going forward or going back to '16, I don't want

H841func

1 to forfeit the right to perhaps pursue an equitable claim for
2 quantum meruit.

3 THE COURT: I understand.

4 MR. FANNING: Thank you, your Honor.

5 THE COURT: But in the meantime, I would like the
6 parties to discuss the issue of whatever the amount is for
7 whatever services, putting it in escrow and see if you can work
8 that out. Okay.

9 All right? If there's nothing else, we'll stand
10 adjourned. Thank you very much.

11 MS. SHIELDKRET: Thank you, your Honor.

12 MR. FANNING: Thank you, your Honor.

13 (Adjourned)
14
15
16
17
18
19
20
21
22
23
24
25